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March 6, 1996

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FEDERAL COMMUNICATIONS COMMISSION
114 WEST 47TH STREET
NEW YORK, N.Y. 10036
(212) 944-7711

BY HAND

Mr. William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Petition for Reconsideration in
CC Docket No. 92-115 -- Ex Parte Presentation

Dear Mr. Caton:

This is to provide notice, pursuant to Section 1.1206 of the Commission's Rules, that the enclosed letter and the attachments identified therein were forwarded today to David L. Furth, Chief of the Commercial Radio Division of the Wireless Telecommunications Bureau, along with a copy of this letter. An original and two copies of this notice and the attachments are being submitted today for inclusion in the above-referenced docket.

If you have any questions regarding this matter, please contact me.


Very truly yours,



Timothy J. Fitzgibbon
Counsel for
C-Two Plus Technology

TJF:slf
cc: David A. Furth, Esquire

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OFFICE OF SECRETARY
114 WEST 47TH STREET
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March 6, 1996

BY HAND

David L. Furth, Esquire
Chief, Commercial Radio Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 7002
Washington, D.C. 20054

Re: C2+ Petition for Reconsideration
Ex Parte Presentation - CC Docket No. 92-115

Dear David:

Pursuant to your request during our meeting this morning, enclosed are copies of the amended complaint and briefs filed in the summary judgment proceedings in the United States District Court for the Southern District of Texas. My understanding is that similar damages claims have been asserted against another extension service provider in a case pending in the United States District Court in Phoenix, Arizona.

Two copies of this letter and the attachments are being forwarded to the Secretary's office under separate cover for filing in the above-referenced docket. A copy of the letter to the Secretary's office is included for your convenience.

Sincerely,


Timothy J. Fitzgibbon

TJF:tbm
Enclosures (4)

RECEIVED

MAR - 6 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MAY 24 1996

Michael N. Miley, Clerk

HOUSTON CELLULAR
TELEPHONE COMPANY

v.

C.A. 95-617

JOHN C. NELSON, individually and
d/b/a both CELL TIME CELLULAR and
ACTION CELLULAR and DANNY
HART, individually and d/b/a both
ACTION CELLULAR and ACTION
CELLULAR EXTENSION and
C2+ TECHNOLOGY, INC.

PLAINTIFF'S FIRST AMENDED ORIGINAL COMPLAINT
AND REQUEST FOR DECLARATORY RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

I.
JURISDICTION AND PARTIES

1. This case arises under the constitution, laws or treaties of the United States 28 U.S.C. 1331. Houston Cellular seeks damages for violation of orders of the Federal Communication Commission, now codified in part at 47 C.F.R. 22.919(a). Furthermore, this case involves parties of different states with damages in excess of \$50,000. 28 U.S.C. 1332.
2. Houston Cellular is a Texas general partnership with its principal place of business at One West Loop South, Suite 300, Houston, Texas, 77027.
3. C2+ Technology, Inc. (C2+) is an Alabama corporation with its principal place of business in Montgomery, Alabama. C2+ may be served by serving its President, Richard A. Graydon, at the following address: 1307 Vaughn Road, Pike Road, Alabama, 36064.
4. John C. Nelson, individually and d/b/a both Cell Time Cellular and Action Cellular, has previously been served and has appeared herein.
5. Danny Hart, individually and d/b/a both Action Cellular and Action Cellular Extension, has previously been served and has appeared herein.

RECEIVED

MAR - 6 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

II. VENUE

6. Venue is proper in this district for two reasons. First, a substantial part of the events giving rise to Houston Cellular's claim occurred in this district. 28 U.S.C. §1391(a)(2). Second, C2+ is an entity with contacts sufficient to deem it a resident of this judicial district. 28 U.S.C. §1391(c).

III. SUMMARY OF ALLEGATIONS

7. Pursuant to 28 U.S.C. 2201(a), Houston Cellular seeks an order from the court declaring the rights and obligations of the parties, specifically stating that C2+ cannot alter, transfer, emulate or manipulate the ESN of cellular telephones in the Houston Metropolitan Statistical Area or assist in any such activity in violation of the FCC's ESN Orders. Furthermore, Houston Cellular seeks recovery of its actual damages incurred as a result of C2+'s violation of the FCC's ESN Orders. Finally, pursuant to 28 U.S.C. 2202, Houston Cellular seeks recovery of its reasonable and necessary attorney's fees incurred by prosecution of this action.

IV. FACTUAL BACKGROUND

8. Houston Cellular is licensed by the FCC as the exclusive provider of cellular communications services on its authorized frequencies in the Houston Metropolitan Statistical Area, which includes Harris, Liberty, Montgomery, Waller, Fort Bend and Brazoria Counties.

9. C2+ is engaged in the process of altering, manipulating, or emulating the Electronic Serial Numbers on cellular telephones in violation of the FCC's ESN Orders. 10. The Electronic Serial Number ("ESN") is a 32 bit binary number that uniquely identifies a cellular mobile transmitter to a cellular system. It is separate and distinct from the phone's 10-digit telephone number.

10. The alteration of a cellular telephone's ESN allows a person to simulate the signal of a different cellular telephone. This process, called emulation, allows one cellular phone to emulate, or imitate, another cellular phone. This allows a person to make a call on one cellular telephone

while actually charging the call to another. Alteration of an ESN facilitates fraudulent and unauthorized cellular calls. An unauthorized user of a cellular phone that has an altered ESN can make numerous local and long distance calls and have the charges billed to a totally unsuspecting cellular customer. Alternatively, ESN alteration enables one cellular phone to emulate another cellular phone beyond the detection abilities of cellular licensees. This enables a customer to use more than one telephone for the same telephone number, thereby avoiding monthly access charges charged by Houston Cellular and other cellular licensees. By altering an ESN, a customer can fraudulently avoid paying the monthly access charge for multiple cellular phones, resulting in a significant loss of revenues to Houston Cellular.

11. Furthermore, Houston Cellular has recently offered a special long distance program whereby, for a monthly fee, Houston Cellular will allow free air time on all long distance calls in the State of Texas. Use of this long distance program will allow a customer to call long distance from his cellular telephone and pay only the rate charged by the customer's pre-selected long distance carrier. Houston Cellular will not charge for air time on such calls. Alteration of an ESN allows a customer to have multiple cellular phones covered by a single monthly fee payment for the long distance program, resulting in a substantial loss of revenue to Houston Cellular.

12. John C. Nelson, individually and doing business as Cell Time Cellular and as Action Cellular, was engaged in the unauthorized practice of altering, transferring, emulating or manipulating the ESN of cellular telephones to emulate other phones subscribed to Houston Cellular.

13. John C. Nelson, individually and doing business as Cell Time Cellular and Action Cellular, was an exclusive agent of C2+ in the Houston Metropolitan Statistical Area.

14. As a result of C2+'s unauthorized transferring, emulating or manipulating of ESN's of Houston Cellular customers, Houston Cellular has suffered damages, including, but not limited to, lost monthly access fees, lost monthly long distance fees, and the cost to replace emulated phones for Houston Cellular customers. Houston Cellular has also incurred attorney's fees as a result of

its efforts to stop C2+'s agent from wrongfully transferring, emulating or manipulating the ESN of cellular telephones. Finally, Houston Cellular has incurred and will continue to incur additional damages as customers have refused to replace their emulated phones in violation of the FCC orders. As a result, Houston Cellular was required to discontinue service to its customers.

V. FCC REGULATIONS

15. On May 4, 1981, the FCC released an Order entitled "An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems," 86 F.C.C.2d 469 (1981) in which it, among other things, adopted technical specifications for the use of cellular telephones, including a requirement that each phone have a unique ESN. See 86 F.C.C.2d at 508 & n.78, 573, and 593. This FCC Order (the "First ESN Order") was published in the Federal Register on May 21, 1981 (46 Fed. Reg. 27655) with corrections on June 16, 1981 (46 Fed. Reg. 31417.) A copy of this First ESN Order is attached as Exhibit "A." On September 9, 1994, the FCC released an Order entitled "Revision of Part 22 of the Commission Rules Governing the Public Mobile Services." This FCC Order (the "Second ESN Order") was published in the Federal Register on November 17, 1994 (59 Fed. Reg. 59502). (The First ESN Order and Second ESN Order are collectively referred to herein as the ESN Orders.) A copy of the Second ESN Order is attached as Exhibit "B."

16. In response to an FCC Notice of Proposed Rule Making, released June 12, 1992, 7 F.C.C. Rcd. 3658, and published in the Federal Register July 1, 1992 (57 Fed. Reg. 29260), C2+ Technology, a company that altered ESN's, requested the FCC to amend the Commission's rules and allow companies to market ancillary cellular equipment that emulates ESN for the purpose of allowing more than one cellular telephone to have the same telephone number. See paragraph 67 of Exhibit "C."

17. The FCC specifically rejected the proposed amendment of the emulator. The Commission wrote:

Further, we conclude that the practice of altering cellular phones to "emulate" ESN without receiving the permission of the relevant cellular licensee should not be allowed because (1) simultaneous use of cellular telephones fraudulently emitting the same ESN without the licensee's permission could cause problems in some cellular systems such as erroneous tracking or billing; (2) fraudulent use of such phones without the licensee's permission could deprive cellular carriers of monthly per telephone revenues to which they are entitled; and (3) such altered phones not authorized by the carrier, would therefore not fall within the licensee's blanket license, and thus would be unlicensed transmitters in violation of Section 301 of the Act.

See paragraph 60 of Exhibit "C."

18. The Commission further concluded:

Nevertheless, with regard to existing equipment, we conclude that cellular telephones with altered ESN do not comply with the cellular system compatibility specification¹ and thus may not be considered authorized equipment under the original type acceptance. Accordingly, a consumer's knowing use of such altered equipment would violate our rules. We further believe that any individual or company that knowingly alters cellular telephones to cause them to transmit an ESN other than the one originally installed by the manufacturer is aiding in the violation of our rules. Thus, we advise all cellular licensees and subscribers that the use of the C2+ altered cellular telephones constitutes a violation of the Act and our rules.

See paragraph 62.2 (emphasis added).

In conclusion, in its Second ESN Order, the FCC clearly stated (1) use of altered cellular telephones constitutes a violation of both the Communications Act of 1934, as amended, and the

¹See previous 47 CFR § 22.915, which became new 47 CFR § 22.933, adopted in the Second ESN Order.

²The Second ESN Order also revised § 22.919(c), effective January 1, 1995, to require all manufacturers of cellular telephones to design their telephones such that any attempt to remove, tamper with, or change the ESN chip, will render the mobile transmitter inoperative. Thus, in new model telephones designed and FCC approved after January 1, 1995, Houston Cellular and other cellular licensees should not be plagued with companies that alter ESN in violation of the law. Any attempt to alter the ESN will render the cellular telephone inoperable.

First ESN Order as codified in Commission rules, and (2) any company that knowingly alters cellular telephones is "aiding in the violation of our [FCC] rules."

VIII.
REQUEST FOR DECLARATORY RELIEF PURSUANT TO
28 U.S.C. 2201 ET SEQ.

19. Pursuant to 28 U.S.C. 2201(a), Houston Cellular seeks a judgment from this court declaring the rights and obligations of Houston Cellular and C2+. Specifically, Houston Cellular asks the court to declare:

(1) C2+'s altering, transferring, emulating or manipulating of electronic serial numbers is a violation of the FCC's ESN Orders and regulations and aids and assists others in violating the FCC's ESN Orders and regulations.

(2) The use of emulated or altered telephones is a violation of the FCC's ESN Orders and regulations.

(3) Houston Cellular has the right and the obligation to determine the names of all customers who have had their cellular telephones altered, transferred, emulated or manipulated so as to advise and notify the customer that the use of altered, transferred, emulated or manipulated telephones is a violation of the FCC's ESN Orders and regulations.

(4) C2+ has no right to alter, transfer, emulate or manipulate cellular telephones of Houston Cellular customers.

20. Pursuant to 28 U.S.C. 2202, Houston Cellular seeks reimbursement of the reasonable and necessary attorneys' fees incurred by Houston Cellular for bringing this declaratory judgment action.

IX.
NEGLIGENCE AND NEGLIGENT MISREPRESENTATION

21. C2+ should have known that altering, manipulating or transferring the ESN of cellular phones was in violation of FCC ESN Orders. C2+ either failed to keep current with FCC

regulations or willfully disobeyed orders from the FCC which specifically prohibited the alteration, manipulation or emulation of cellular phones. In either case, C2+ negligently represented to its agent and its customers that altering, manipulating or emulating the ESN was legal and negligently altered, manipulated or emulated the ESN of Houston Cellular customers in violation of ESN Orders.

22. As a result of C2+'s negligence and negligent misrepresentations, Houston Cellular seeks damages in excess of the \$50,000 jurisdictional amount. Furthermore, as the conduct of C2+ was outrageous, willful and in complete disregard to the rights of Houston Cellular and its customers, Houston Cellular seeks punitive damages in an amount to be determined by the trier of fact.

XI. **PRAYER**

23. Houston Cellular asks the court to enter a declaratory judgment against C2+ declaring that C2+'s altering, transferring, emulating or manipulating ESN's is a violation of the FCC's ESN Orders and aids and assists others in violating the FCC's ESN Orders and regulations, the use of emulated or altered telephones is a violation of the FCC's ESN Orders and that C2+ has no right to alter, transfer, emulate or manipulate cellular telephones of Houston Cellular Customers. Houston Cellular also seeks reimbursement of its reasonable and necessary attorney's fees incurred by Houston Cellular in bringing this action.

24. Houston Cellular also seeks actual damages for C2+'s fraudulent and/or negligent conduct as well as punitive damages to be determined by the trier of fact.

Respectfully submitted,

By: 

Mark A. Carrigan
Federal I.D. No. 4999
State Bar No. 03875200

Carlton D. Wilde, Jr.
Federal I.D. No. 10694
State Bar No. 21458001

500 Dallas Street, Suite 2600
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HOUSTON CELLULAR TELEPHONE COMPANY**

OF COUNSEL:

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOUSTON CELLULAR
TELEPHONE COMPANY

V.

C.A. 95-617

JOHN C. NELSON, Individually and
d/b/a both CELL TIME CELLULAR and
ACTION CELLULAR and DANNY
HART, Individually and d/b/a both
ACTION CELLULAR and ACTION
CELLULAR EXTENSION and
C2+ TECHNOLOGY, INC.

ORDER

Plaintiff Houston Cellular Telephone Company's Motion for Leave to File a First Amended Complaint is pending before the Court. After reviewing the Motion, the Court ORDERS that Plaintiff's Motion for Leave to File First Amended Complaint is GRANTED.

SIGNED this _____ day of _____, 1995.

JUDGE PRESIDING

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOUSTON CELLULAR
TELEPHONE COMPANY

v.

JOHN C. NELSON, individually and
d/b/a both CELL TIME CELLULAR and
ACTION CELLULAR and DANNY
HART, individually and d/b/a both
ACTION CELLULAR and ACTION
CELLULAR EXTENSION

§ C.A. NO. 95-617
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**HOUSTON CELLULAR'S MOTION FOR PARTIAL SUMMARY JUDGMENT
AGAINST DEFENDANT C2+ TECHNOLOGY, INC.**

Houston Cellular Telephone Company (Houston Cellular) is suing C2+ Technology, Inc. (C2+) for damages and a declaratory judgment relating to C2+'s illegal emulation of the Electronic Serial Numbers (ESN) of cellular telephones. Because there are no genuine issues of material fact and Houston Cellular is entitled to judgment as a matter of law, Houston Cellular requests the court grant summary judgment in its favor under Fed.R.Civ.P. 56.

BACKGROUND FACTS:

1. Houston Cellular, a cellular carrier, is licensed by the Federal Communications Commission (FCC) as the exclusive provider of cellular communications services on its authorized frequencies in the Houston Metropolitan Statistical Area, which includes Harris, Liberty, Montgomery, Waller, Fort Bend and Brazoria Counties. See Affidavit of Mike Hanafin attached to this motion as Exhibit "A".

2. The ESN on a cellular telephone is a 32 bit binary number that uniquely identifies a cellular mobile transmitter to a cellular system. See Affidavit of Mike Hanafin. It is separate and distinct from the phone's 10-digit telephone number. One purpose of the ESN in a cellular telephone is similar to the Vehicle Identification Number in an automobile. It uniquely identifies the equipment to assist in recovery, if the equipment is stolen. More importantly, the ESN is designed to identify an authorized subscriber and enable cellular licensees, like Houston Cellular,

to authorize system use and to properly bill for calls made to and from a cellular telephone. See Second ESN Order (defined below) attached to this motion as Exhibit "B" at paras. 54, 59.

3. Altering a cellular telephone's ESN allows a person to simulate the signal of a different cellular telephone. This process, called emulation, allows one cellular phone to emulate, or imitate, another cellular phone. A person may then make a call on one cellular telephone while actually charging the call to another phone. Altering an ESN facilitates fraudulent and unauthorized cellular calls. See Second ESN Order at para. 60. An unauthorized user of a cellular phone that has an altered ESN can make numerous local and long distance calls and have the charges billed to a totally unsuspecting cellular customer. Alternatively, ESN alteration enables one cellular phone to emulate another cellular phone beyond the detection abilities of cellular licensees. This enables a customer to use more than one telephone for the same telephone number, thereby avoiding monthly access charges charged by Houston Cellular and other cellular licensees. By altering an ESN, a customer can fraudulently avoid paying the monthly access charge for multiple cellular phones, resulting in a significant loss of revenues to the licensee. See Second ESN Order at para. 60.

4. Houston Cellular recently offered a special long distance program which allowed customers free air time on all long distance calls in the State of Texas. See Affidavit of Mike Hanafin. Use of this long distance program permits a customer to call long distance from his cellular telephone and pay only the rate charged by the customer's pre-selected long distance carrier. Houston Cellular does not charge for air time on the calls. Alteration of an ESN allows a customer to have multiple cellular phones covered by a single monthly fee payment for the long distance program, resulting in a substantial loss of revenue to Houston Cellular. See Affidavit of Mike Hanafin.

5. C2+ developed software, equipment, and manuals to emulate ESNs. See Deposition of Carol Patton which is attached to this motion as Exhibit "C" at p. 14, ll. 11, 12; See 1994 Lease Agreement attached to Affidavit of Mark A. Carrigan as Exhibit "I". The Affidavit of Mark A. Carrigan is attached hereto as Exhibit "D". On August 9, 1994, C2+ entered into a "1994 lease agreement" with Cell Time Cellular in which C2+ agreed to provide Cell Time Cellular

equipment and software to emulate ESNs. See Lease Agreement. Under the lease agreement, John C. Nelson (Nelson), individually and doing business as Cell Time Cellular and as Action Cellular, became an exclusive distributor of C2+'s "product" (the software and equipment to emulate ESNs) in the Houston Metropolitan Statistical Area. See Deposition of John C. Nelson, attached to this motion as Exhibit "E", at pp. 28, 29; See Deposition of Carol Patton at p. 37, ll. 9,10. Using ideas provided by C2+, Nelson advertised his service of allowing a customer "more than one phone on the same number." See Advertisement of Action Cellular Extension, Inc. attached to Affidavit of Mark Carrigan as Exhibit "2".

6. Nelson, using C2+'s technology and software, emulated the cellular telephones of cellular telephone users throughout Houston, including Houston Cellular customers. See Loading Code Order Form attached to Affidavit of Mark Carrigan as Exhibit "3". C2+ provided Nelson marketing ideas and sent him samples of advertisements. See Deposition of Carol Patton, p. 27, ll. 18 to p. 28, ll. 3. Nelson was sent forms by C2+ to be filled out when a customer purchased an emulated phone. See Loading Code Order Form. In addition, C2+ provided Nelson referrals of customers in Houston. See Deposition of Carol Patton at p. 90, ll. 16-23. For cellular telephones other than Motorolas, Nelson sent the telephone to C2+ in Montgomery, Alabama to be emulated. See Deposition of John Nelson at p. 39, ll. 7-11; See Deposition of Carol Patton, p. 41, ll. 14 to p. 42 ll. 8.

7. C2+ represented to Nelson that emulating cellular telephones of Houston Cellular customers was legal. See Deposition of John C. Nelson at pp. 32, 33; See Public Notice attached to the Affidavit of Mark Carrigan as Exhibit "4"; See Deposition of Carol Patton at p. 34, ll. 22 to p. 36, ll. 4.

8. As a result of C2+'s emulation of ESN's of Houston Cellular customers, Houston Cellular could not track users of its service. See Affidavit of Mike Hanafin. Houston Cellular was unable to bill for certain air time and unable to determine the correct number of telephones per customer for monthly access charges. Houston Cellular lost monthly access fees, revenues from the cost of replacing emulated phones for Houston Cellular customers, and revenues from

"features" available to Houston Cellular customers (e.g., weekend saver, voice activated dialing, voice mail, call forwarding, and conference calling). See Affidavit of Hanafin. Houston Cellular also incurred attorneys' fees as a result of its efforts to stop C2+'s agents from wrongfully emulating the ESNs of cellular telephones. Finally, Houston Cellular incurred losses from customers who were not willing to replace their emulated phones, and Houston Cellular had to disconnect their cellular service. See Affidavit of Hanafin.

LEGAL ARGUMENTS AND AUTHORITIES

Summary Judgment Standard

9. Fed.R.Civ.P. 56 requires a moving party to affirmatively demonstrate by admissible evidence that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. When the moving party has carried his burden under Rule 56(c), his opponent must present more than a metaphysical doubt about the material facts. Washington v. Armstrong World Indus., Inc., 839 F.2d 1121, 1123 (5th Cir. 1988) (citing Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)). To defeat the motion, a nonmovant must bring forth "significant probative evidence demonstrating the existence of a triable issue of fact." In re Municipal Bond Reporting Antitrust Litg., 672 F.2d 436, 440 (5th Cir. 1982). In this case, the undisputed evidence shows C2+ violated FCC ESN Orders by emulating the cellular telephones of Houston Cellular customers.

Emulation by C2+ Violates FCC ESN Orders

10. On May 4, 1981, after notice in the Federal Register, the FCC issued an Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems. 86 F.C.C.2d 469 (1981). The FCC adopted technical specifications for cellular telephones, including that each phone have a unique ESN. See 86 F.C.C.2d at 593, 2.3.2. This FCC Order was published in the Federal Register on May 21, 1981 (46 Fed. Reg. 27655) with corrections on June 16, 1981 (46 Fed. Reg. 31417) (the First ESN Order). A copy of the First ESN Order is attached as Exhibit "F".

11. In response to an FCC Notice of Proposed Rule Making, released June 12, 1992, 7 F.C.C. Red. 3658, and published in the Federal Register July 1, 1992, (57 Fed. Reg. 29260), C2+ requested the FCC amend the Commission's rules and allow companies to market ancillary cellular equipment that emulates ESNs for the purpose of allowing more than one cellular telephone to have the same telephone number.

12. On September 9, 1994, after notice in the Federal Register, the FCC issued "Revision of Part 22 of the Commission Rules Governing the Public Mobile Services" (published in the Federal Register on November 17, 1994, 59 Fed. Reg. 59502) (the Second ESN Order) attached as Exhibit "B". In the Second ESN Order, the FCC specifically rejected C2+'s proposed amendment of the rules concerning emulation. The Commission wrote:

Further, we conclude that the practice of altering cellular phones to "emulate" ESNs without receiving the permission of the relevant cellular licensee should not be allowed because (1) simultaneous use of cellular telephones fraudulently emitting the same ESN without the licensee's permission could cause problems in some cellular systems such as erroneous tracking or billing; (2) fraudulent use of such phones without the licensee's permission could deprive cellular carriers of monthly per telephone revenues to which they are entitled; and (3) such altered phones not authorized by the carrier, would therefore not fall within the licensee's blanket license, and thus would be unlicensed transmitters in violation of Section 301 of the Act.

See paragraph 60 of Exhibit "B".

13. The Commission further concluded:

Nevertheless, with regard to existing equipment, we conclude that cellular telephones with altered ESNs do not comply with the cellular system compatibility specification¹ and thus may not be considered authorized equipment under the original type acceptance. Accordingly, a consumer's knowing use of such altered equipment would violate our rules. We further believe that any individual or company that knowingly alters cellular telephones to cause them to transmit an ESN other than the one originally installed by the manufacturer is aiding in the violation of our rules. Thus, we advise all cellular licensees and subscribers that the use of the C2+ altered cellular telephones constitutes a violation of the Act and our rules.

¹See previous 47 CFR § 22.915, which became new 47 CFR § 22.933, adopted in the Second ESN Order.

See paragraph 62.² (emphasis added). The First ESN Order and Second ESN Orders are referred to as the FCC ESN Orders.

14. The FCC ESN Orders were regularly made, published in the federal register, and served on defendants by publication. 5 U.S.C. § 552(a)(1). See also, Fed.Crop. Ins. v. Merrill, 332 U.S. 380, 384-85 (1947). The orders adopted by the FCC constitute orders within the meaning of § 401(b) (47 U.S.C. § 401(b)) of the Communication Act of 1934.

C2+ Unlawfully Emulated the ESNs of Houston Cellular Customers' Cellular Telephones

15. C2+ did not seek or obtain permission from Houston Cellular to emulate the ESNs of its customers. See Deposition of Carol Patton at p. 44, ll. 2-20; See Affidavit of Mike Hanafin. C2+'s conduct in emulating cellular telephones of Houston Cellular customers therefore violates the FCC ESN Orders.

16. C2+ is liable for its own acts as well as the acts of John C. Nelson, its authorized agent. Under Texas law, what a principal does through her agent, she does herself. Shaw v. Kennedy, Ltd., 879 S.W.2d 240 (Tex.App.-Amarillo 1994 writ denied). In determining a principal's vicarious liability, the proper question is whether the agent was acting within the scope of the agency relationship when he committed the act. Celtic Life Ins. Co. v. Coats, 885 S.W.2d 96 (Tex. 1994). An agent may perform such acts as are necessary and proper to accomplish the purpose for which agency was created. Polland & Cook v. Lehmann, 832 S.W.2d 729 (Tex.App.-Houston [1st Dist.] writ denied). The sole business entrusted to Nelson by C2+ under the lease agreement was to emulate cellular telephones, and for each cellular telephone emulated, Nelson used C2+'s technology, software, and expertise. Accordingly, Nelson acted as C2+'s authorized agent in emulating the cellular telephones of Houston Cellular customers.

²The Second ESN Order also revised § 22.919(c), effective January 1, 1995, to require all manufacturers of cellular telephones to design their telephones such that any attempt to remove, tamper with, or change the ESN chip, will render the mobile transmitter inoperative. Thus, in new telephones, Houston Cellular and other cellular licensees should not be plagued with companies that alter ESNs in violation of the law. Any attempt to alter the ESN will render the cellular telephone inoperable.

C2+'s Conduct Constitutes Negligence Per Se

17. Under Texas law, violation of an administrative order, statute or ordinance is negligence per se. Sheppard v. Judkins, 476 S.W.2d 102, 107 (Tex.Civ.App.-Texarkana 1971, writ rel'd n.r.e.). The Restatement of Torts § 288B (1965) provides that the unexcused violation of a legislative enactment or administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.³ Generally, Texas courts adopt an administrative rule or regulation as a standard for negligence if a purpose of the rule is to afford protection to the class of persons to which the injured party belongs against the hazard involved in the particular case. Carter v. William Sommerville and Son, Inc., 584 S.W.2d 274, 278 (Tex. 1979).

18. The FCC states it enacted the FCC ESN Orders because altering ESNs "could cause problems in some cellular systems such as erroneous tracking or billing" and it "could deprive cellular carriers of monthly per telephone revenues to which they are entitled." See Second ESN Order attached as Exhibit "B" at para. 60. Houston Cellular has suffered the exact damages anticipated by the FCC because of C2+'s emulation of Houston Cellular customers' cellular telephones: erroneous tracking and billing and lost monthly revenues. C2+ knew, or reasonably should have known, its conduct would cause Houston Cellular to suffer this harm.⁴ The FCC ESN Orders should therefore define the standard of care for C2+'s conduct relating to cellular carriers.

³ The Fifth Circuit has affirmed that Texas law recognizes two distinct sources of legal duty for negligence claims: duty arising from statute and general duty of due care recognized at common law. Hayes v. U.S., 899 F.2d 438 (5th Cir. 1991).

⁴ Houston Cellular must show C2+'s violation of FCC ESN Orders proximately caused its injuries. See Hudson v. Winn, 859 S.W.2d 504 (Tex.App.-Houston [1st Dist.] 1993, writ denied). Proximate cause has two essential elements: cause in fact and foreseeability. McClure v. Allied Stores of Texas Inc., 608 S.W.2d 901 (Tex. 1980). Foreseeability is satisfied because C2+, using ordinary intelligence, should have anticipated harm to Houston Cellular from its negligent conduct. See McClure v. Allied Stores of Texas Inc., 608 S.W.2d 901 (Tex. 1980).

In the Alternative, C2+'s Conduct Constitutes Common Law Negligence

19. Under Texas law, C2+ had a duty to exercise reasonable care to avoid foreseeable injury to Houston Cellular from its conduct and the conduct of Nelson. See El Chico v. Poole, 732 S.W.2d 306, 312 (Tex. 1987) (an actor must take affirmative steps to avoid increasing danger from another's conduct which the actor has, in part, created). C2+ should have known that emulating the ESNs of cellular phones violated the FCC ESN Orders and would cause financial harm to Houston Cellular and any other carriers whose customers were affected. C2+ either failed to keep current with FCC regulations or willfully disobeyed orders from the FCC. In either case, C2+'s emulation of cellular telephones proximately caused Houston Cellular to suffer loss of revenues, including the loss of air time and monthly access charges. C2+ is therefore liable for common law negligence.

Houston Cellular is Entitled to Declaratory Relief Under 28 U.S.C. 2201 Et Seq.

20. Pursuant to 28 U.S.C. 2201(a), Houston Cellular is entitled to a judgment from the court declaring the rights and obligations of Houston Cellular and the defendant. Specifically, Houston Cellular asks the court to declare:

- (1) C2+ altering, transferring, emulating or manipulating ESNs is a violation of the FCC's ESN Orders;
- (2) The use of emulated or altered telephones is a violation of the FCC's ESN Orders and regulations;
- (3) C2+ has no right to alter, transfer, emulate or manipulate cellular telephones of Houston Cellular customers;
- (4) Advertising to emulate cellular telephones by C2+, its representatives, franchisees, distributors, and other agents is a violation of the FCC's ESN Orders; and
- (5) Houston Cellular has suffered harm as a result of C2+'s unlawful emulation of cellular telephones.

21. Pursuant to 28 U.S.C. § 2202, Houston Cellular is entitled to reimbursement of the reasonable and necessary attorneys' fees incurred by Houston Cellular for bringing this lawsuit.

CONCLUSION

22. Houston Cellular requests this court enter summary judgment in its favor holding C2+ liable for emulating the ESN's of Houston Cellular customers and for such other relief, at law or in equity, to which Houston Cellular is entitled.

Respectfully submitted,

By: 

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOUSTON CELLULAR
TELEPHONE COMPANY

v.

JOHN C. NELSON, individually and
d/b/a both CELL TIME CELLULAR and
ACTION CELLULAR and DANNY
HART, individually and d/b/a both
ACTION CELLULAR and ACTION
CELLULAR EXTENSION

§ C.A. NO. 95-617
§
§
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§
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§
§

ORDER

Houston Cellular Telephone Company filed a motion for partial summary judgment on January 19, 1996. Because there are no genuine issues of material fact and Houston Cellular is entitled to judgment as a matter of law, the court hereby ORDERS Houston Cellular's motion for summary judgment is GRANTED and judgment is entered in favor of Houston Cellular holding C2+ Technology, Inc. (C2+) liable for negligence in emulating the cellular telephones of Houston Cellular employees. The Court also declares the following rights and obligations of Houston Cellular and C2+:

- (1) C2+ altering, transferring, emulating or manipulating ESNs is a violation of the FCC's ESN Orders;
- (2) The use of emulated or altered telephones is a violation of the FCC's ESN Orders and regulations;
- (3) C2+ has no right to alter, transfer, emulate or manipulate cellular telephones of Houston Cellular customers; and
- (4) Advertising to emulate cellular phones by C2+, its representatives, franchisees, distributors and other agents is a violation of the FCC's ESN Orders, and
- (5) Houston Cellular has suffered harm as a result of C2+'s unlawful emulation of cellular telephones. The Court also Orders Houston Cellular is entitled to recover attorneys' fees incurred by Houston Cellular for bringing this lawsuit.

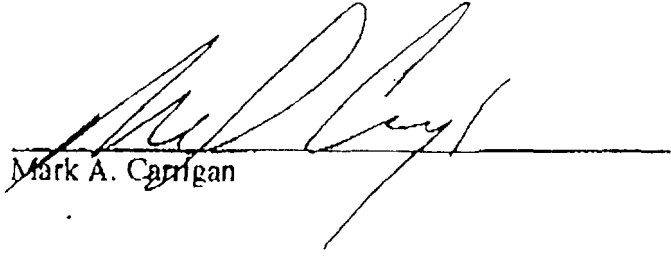
SIGNED this _____ day of _____, 1996.

JUDGE PRESIDING

CERTIFICATE OF SERVICE

A true and correct copy of Plaintiff's Motion for Summary Judgment with its corresponding Order was duly served upon all parties or their counsel of record by hand delivery, properly addressed on this the 22nd day of January, 1996.

Mr. James Nash
Nash & Orlando, L.L.P.
5851 San Felipe, Suite 890
Houston, Texas 77057



Mark A. Carrigan

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

96 FEB 12 PM 4:41

SOUTHERN DISTRICT
OF TEXAS

**HOUSTON CELLULAR TELEPHONE
COMPANY,**)

Plaintiff,)

vs.)

CIVIL ACTION NO. H-95-617

JOHN C. NELSON, individually)
and D/B/A both CELL TIME)
CELLULAR and ACTION CELLULAR;)
DANNY HART, individually and)
D/B/A both ACTION CELLULAR and)
ACTION CELLULAR EXTENSION; and)
C-TWO PLUS TECHNOLOGY, INC.,)
Defendants.)

**DEFENDANT C-TWO PLUS TECHNOLOGY, INC.'s, RESPONSE IN OPPOSITION
TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Houston Cellular Telephone Company ("HCTC") brings this action against C-Two-Plus Technology, Inc. ("C2+"). HCTC has filed the referenced Motion for Partial Summary Judgment, alleging that no genuine issues of material fact exist. C2+ files its Response, which will show that genuine issues of material fact exist, and further that HCTC is not entitled to a judgment as a matter of law.

BACKGROUND

1. HCTC provides cellular telephone services in the Houston, Texas, area. C2+ is an Alabama corporation which previously developed an encrypted emulation process whereby it provides cellular extension phones. The phones of C2+ use the same number as the consumer's first phone. A cellular telephone number is functionally the equivalent

to a wire telephone line, as the term "line" is commonly used in telecommunications parlance. The emulation process involves duplicating a cellular telephone's electronic serial number or "ESN" on a second cellular telephone. This second phone is the functional equivalent of an extension telephone in a wire telephone system. C2+ uses an encrypted process whereby the extension phone is emulated to transmit the ESN of the first phone so the cellular consumer will be properly billed by his carrier for all of the airtime used on either phone. See Affidavit of Stuart F. Graydon, at para. 1, 3, and 4, attached and incorporated for all purposes to this Response as Exhibit Three. See Richard C. Levine's Report on ESN Emulation and Cellular Phone Extension Service attached and incorporated for all purposes to this Response as Exhibit Four.

2. Cellular telephone carriers are regulated by the Federal Communications Commission ("FCC.") By order published May 4, 1981, the FCC adopted 47 C.F.R. §22.915 which included technical specifications for cellular telephones. See Paragraph 10 of HCTC's Motion for Partial Summary Judgment ("HCTC's Motion"). (HCTC refers to these rules as "the First ESN Order.") Although, these specifications state that each cellular telephone transceiver must be manufactured with a unique ESN, C2+ will show that such rules do not prohibit the emulation process.

3. On September 9, 1994, after intensive lobbying by a trade group representing the cellular carriers, the FCC issued a Revision of Part 22 of its Rules, as apply to the Public Mobile Services, which became effective January 1, 1995, referred to by HCTC in its Motion as the "Second ESN Order." C2+ will demonstrate that the Order itself applies only to cellular telephone instruments type-accepted by the FCC after January 1,